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The Resolution of Negotiation Impasses in the Federal Service

Frederic Freilicher*

This article examines the methods which have been utilized to resolve collective bargaining disputes in the federal service since 1962. It includes a review of pertinent federal executive orders and some of the practices under those orders, as well as the "legislative history" of the executive orders.

The emphasis will be on a critical evaluation of procedures involving neutral third parties which have been employed in achieving settlement of what are known as "interest disputes," meaning impasses between an employer and a labor organization over the substance of new or changed terms to be included in a collective bargaining agreement.¹

Stress has been placed upon an analysis of the rules and procedures adopted by the agencies charged with assisting in the resolution of negotiation impasses because the success or failure of the present approach to impasse resolution in the federal service may well turn upon the viability of these rules and procedures. Then, too, a critical examination of the rules and procedures may be useful to state and local governmental authorities considering the establishment or modification of methods used to resolve collective negotiation impasses in the public sector.²

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1. This is to be distinguished from a deadlock over the disposition of a grievance concerning an alleged misinterpretation of an existing collective bargaining agreement. The resolution of grievances is not covered here.

2. No attempt is made to reach the larger issue of the right to strike, denied Federal employees, which is beyond the scope of this article. It is clear, however, that effective impasse resolution procedures may be important, indeed essential, in both systems which prohibit strikes and those which do not. To be sure, the choice of specific procedures may turn in part on whether government employees can legally strike. Furthermore, the availability of mechanisms for resolving impasses may also

The principal means of resolving collective bargaining impasses include mediation, fact-finding, and binding arbitration. Mediation usually involves the intervention of one or more outside individuals not parties to the dispute who seek to use their expertise to assist the parties in a resolution of the dispute.³ A mediator, who maintains a neutral stance as between the disputants, has no power to bind the parties to any one particular outcome or, for that matter, to insist that they settle. Fact-finding involves the assignment of one or more neutral individuals to determine the facts and circumstances of the dispute, and the positions of the parties on the issues. The fact-finder usually incorporates his findings in a written report which may or may not include recommendations for settlement of the dispute. A fact-finder's recommendations are not binding on the parties, however.⁴ In the course of the fact-finding proceeding the fact-finder may attempt to mediate some or all issues. Where there is binding arbitration, one or more individuals are empowered to make a written award, involving a disposition of the issues, which the parties are bound to accept. Prior to the rendering of the award, the arbitrator conducts a hearing to get the evidence and positions of the parties on the issues. Binding arbitration should be distinguished from advisory arbitration where the arbitrator's award is not binding on the parties. Advisory arbitration is arguably the same or very close to fact-finding with recommendations.

The Goldberg Task Force

In November 1961, President Kennedy's Task Force on Employee-Management Relations in the Federal Service, chaired by then Secretary of Labor Arthur Goldberg,⁵ submitted a series of recommendations among which was one on negotiation impasses:

Impasses in negotiations between Government officials and employee organizations granted exclusive recognition should be solved by other means than arbitration. Methods for helping to bring

be limited by the presence of agencies already assisting in the resolution of impasses in the private sector which could provide mediation and fact-finding services in the public sector as well. Political and budgetary considerations may also enter into the selection and operation of impasse procedures. Nevertheless, one may contend that many of the problems encountered in the administration of the federal executive orders regulating collective bargaining for federal employees are sufficiently common to most schemes of public sector impasse resolution to be of interest to those in other jurisdictions concerned with government employee labor relations.

3. A thorough analysis of mediation techniques is presented by K. KRESSEL, *LABOR MEDIATION: AN EXPLORATORY SURVEY*, 1972 (study submitted to the National Science Foundation—NSF Grant GS-2317X, *Elements of Conflict Resolution*).

4. T. Gilroy and A. Sinicroppi, *Labor Management Services Administration*, United States Department of Labor.

5. Hereinafter referred to as the Goldberg Task Force.

*about settlements should be devised and agreed to on an agency by agency basis.*⁶

In recommending against the use of arbitration, the Task Force reasoned that it was "quite likely that the availability of arbitration would have an escalation effect whereby the parties, instead of working out their differences by hard, serious negotiation, would continually take their problems to a third party for settlement."⁷

Executive Order 10988, which was approved by President Kennedy on January 17, 1962, authorized federal employees, through employee organizations of their own choosing, to negotiate collectively with federal agency management on "personnel policies and practices, and matters affecting working conditions, that are of concern to its members."⁸ Wages, a subject for collective bargaining in the private sector, was not within the scope of federal sector bargaining. Federal employee wages were then and are now determined by Congress. Furthermore, broad management prerogatives language in Section 6(b) of the Executive Order withdrew from the scope of negotiations "such areas of discretion and policy as the mission of an agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work."⁹

While it was at least arguable that the Task Force recommendations and accompanying rationale indicated the Task Force's specific concern about the use of binding arbitration, Section 8(b)(2) of Executive Order 10988 broadly prohibited the use even of advisory arbitration in the resolution of negotiation impasses. Furthermore, the Order gave no specific direction to the parties with respect to adoption of impasse resolution procedures, leaving them essentially to their own devices. As it turned out, these devices were, in the view of some observers, frequently limited in effect and thus at most only partially satisfactory.

Procedures most often adopted either singly or in combination under Executive Order 10988 included: (1) referral to higher agency authority for final decision; (2) mediation; and (3) fact-finding. A study by the U.S. Bureau of Labor Statistics of 209 agreements¹⁰ in the federal service available to the Bureau in late summer 1964 showed that in about one-fourth

6. PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE, 18 (1961).

7. *Id.* at 19.

8. Exec. Order No. 10988, 27 Fed. Reg. 551, 553 (1962).

9. *Id.* at 554.

10. BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR, COLLECTIVE BARGAINING AGREEMENTS IN THE FEDERAL SERVICE, Late Summer, 1964, at 52-54 (1965).

of the agreements covering some or all employees in 10 agencies there was a provision for appointment of a fact-finding committee, while only 24 of the 209 agreements made specific provision for mediation.¹¹ Some agreements gave the fact-finding committee power to make advisory recommendations on resolution of the issues, arguably a function which contravened the spirit, if not the express language of the prohibition against advisory arbitration in the Executive Order.¹² In a few agreements the mediator was empowered to make recommendations.¹³ About one-fourth of the agreements, some of which also employed fact-finding and/or mediation, provided for submission of unresolved issues to an agency official for final decision.¹⁴

A more recent study by the Bureau of Labor Statistics¹⁵ of 684 agreements in the federal service in effect in November 1967 shows that 201 (about 29 percent) provided for referral to higher authority, while 187 (about 27 percent) utilized fact-finding¹⁶ and 76 had some provision for mediation. Contracts providing for fact-finding, however, covered considerably more employees (102,472 employees) than those providing for referral to higher authority (68,706 employees). About 42 percent of the contracts provided for more than one of the above three procedures. Thus, while the absolute number of agreements employing some form of impasse resolution procedure had risen between 1964 and 1967 as the number of agreements negotiated in the federal service increased, the percentage of agreements employing mediation, fact-finding, or referral to higher authority had not risen appreciably. Significantly, more than half the agreements (53%) surveyed by the Bureau of Labor Statistics in 1967 contained no impasse resolution procedure.¹⁷ Thus, 220,675 employees were still covered by contracts having no impasse resolution procedure; while those

11. *Id.* at 4.

12. *See, e.g.*, the agreement between the General Services Administration, Region 5—Chicago, Ill. and AFGE, Lodge 1626. *Id.* at 53.

13. *See, for example*, Army, Watertown Arsenal—Massachusetts. Association of Engineers and Scientists, (Ind.). *Id.* at 55.

14. *See, e.g.*, the agreement between the General Services Administration, Region 2—New York and AFGE, Lodge 2061 which provides that “[i]mpasses between the employer and the employee organization may be submitted to the Administrator of GSA. . . . The decision of the administrator will be binding upon all concerned.” *Id.* *See*, also the contract between Interior, Bureau of Commercial Fisheries—Seattle, Washington and Alaska Fishermen’s Union (SIU) which states that “[i]f efforts to bring about agreement through mediation are not successful, the dispute shall be submitted to the Director, Bureau of Commercial Fisheries, for consideration of the merits and his decision shall be final and binding on both parties to the dispute.” *Id.*

15. BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR, NEGOTIATION IMPASSE, GRIEVANCE AND ARBITRATION IN FEDERAL AGREEMENTS 7 (1970).

16. Four-fifths of the fact-finding committees were tripartite, and thirteen were bipartite. *Id.* at 8-9.

17. *Id.* at 8.

agreements with an impasse resolution clause covered only 154,810 employees.

Probably the principal reason why the employment of a neutral was not incorporated into more agreements was that in 1967 "most of the government agencies still . . . [would] not allow an outsider to be involved in collective bargaining negotiations."¹⁸ A few agencies, like the Veterans Administration, *required* the adoption of some procedure for impasse resolution.¹⁹ Other agencies set down guidelines for resolving impasses which specifically authorized fact-finding and mediation.²⁰ But, according to the members of the American Bar Association Section of Labor Relations Law, "[t]he fact that mutual consent . . . [was] needed [for third-party intervention] made these policy declarations largely inoperative."²¹

One of the difficulties in employing a mediator was that Executive Order 10988 did not specifically authorize intervention by the Federal Mediation and Conciliation Service (FMCS), the Federal agency which furnishes mediation assistance in the private sector pursuant to authority given it under the Labor Management Relations Act, as amended.²² The absence of such authority under Executive Order 10988 was initially stressed by the Civil Service Commission and the FMCS itself when it refused to intervene in the early years of the Order.²³ Later, the FMCS changed its policy and furnished mediators in some disputes. For the FMCS to intervene, however, both parties had to request mediation assistance and had to

18. 1967 ABA Section of Labor Relations Law 178. See also AFL-CIO Maritime Trades Department, Interim Report on Collective Bargaining in the Public Sector, GERR No. 285, X-8 (Feb. 2, 1969).

19. Indeed, Veterans Administration agreements accounted for 106 of the 187 contracts with a fact-finding provision.

20. 1964 ABA Section of Labor Relations Law 363.

21. 1965 ABA Section of Labor Relations Law 331. The members of the ABA Committee on the Law of Government Employee Relations also noted that then CSC Director Irons had "discounted the importance of the [impasse resolution] problem . . ." The Committee quoted Irons as stating that: "With rare exceptions, the so-called impasses were differences of view on matters of relatively minor importance. They were not on matters which you might expect employees in industry to consider serious enough to cause a breakdown in negotiations." *Id.* Compare the types of issues in disputes in the Federal Sector in which the Federation Mediation and Conciliation Service intervened, as recorded by one experienced mediator: "distributing and assigning overtime work; scheduling the workweek and night shifts; determining procedures for layoff and recall of employees; provisions related to apprenticeship programs and training and journeyman-apprentice ratio; the extent and limitations on paid time for official union business; provisions related to promotions and transfers; procedures dealing with grievance machinery, disciplinary action, adverse action appeals, arbitration and mediation; provisions affecting work classification, job descriptions, and temporary intermittent hires; . . ." Abner, *The FMCS and Dispute Mediation in the Federal Government*, 92 MONTHLY LAB. R. 27, 28 (May 1969).

22. Hereinafter referred to as FMCS.

23. Abner, *supra* note 21 at 27.

agree that there was an impasse.²⁴ Thus, between 1965 and early 1969 the FMCS intervened in only 40 cases. Of 34 cases closed in the above time period, 30 were settled without referral to higher authority.²⁵

The late Willoughby Abner, formerly special assistant to the Director of FMCS identified two major difficulties experienced in mediation under Executive Order 10988: the limited scope of the subjects for bargaining and overcentralization of bargaining authority at the department or agency level.²⁶ The above-described problems, in addition to the desire by many for some kind of final determination of impasses,²⁷ led to a further evaluation of the impasse problem.

Handling of Impasses—President Johnson's Review Committee

Early in 1967 Representative Daniels of New Jersey introduced a bill in Congress which he called the Federal Employees Labor-Management Act. Under the Act either a federal agency or labor organization could request appointment of a mediator by the FMCS. Section 405(b) of the bill established a Government Labor-Management Relations Panel composed of a chairman and from four to six other members, all appointed by the President. There was no requirement that the Panel be tripartite—only that the members not be otherwise employed by the federal government. Under the Daniels bill, the Panel was empowered to use voluntary means to resolve disputes or, failing such resolution, to hold hearings and issue a binding decision.²⁸ The Daniels bill gave a foot in the door to those who wanted FMCS intervention, an independent body to resolve impasses, and finality in the Federal impasse procedures.

On September 8, 1967, President Johnson appointed a committee of nine, chaired by then Secretary of Labor, Willard Wirtz,²⁹ to examine the experience under Executive Order 10988 and consider adjustments in the Order. At a public hearing held by the committee on October 23, 1967, AFL-CIO President George Meany delineated the position of all the AFL-CIO unions representing federal government employees on the question of impasse resolution. Meany outlined a two-step impasse resolution procedure. The first

24. *Id.* Of course, the desire by *both* parties for FMCS intervention probably made the mediator's job easier than it would have been had only *one* side wanted mediation.

25. *Id.* at 28.

26. *Id.* at 29. See, also, 1967 ABA Section of Labor Relations Law 178-79.

27. ABA Section of Labor Relations Law 29 (1969). See also Loewenberg, *Development of the Federal Labor-Management Relations Program: Executive Order 10988 and Executive Order 11491*, 21 LAB. L.J. 73, 76 (1970).

28. H.R. 460, 90th Cong., 1st Sess. § 405 (1967).

29. The committee was assisted by a special advisory panel of five experts. See GERR, No. 216, A-1 (October 30, 1967).

step involved mediation by FMCS mediators. If mediation failed, a five-member Federal Services Disputes Panel, composed of two representatives each from labor and management and an impartial chairman, all to be appointed by the President, could be called upon by either or both sides to assist the parties by various voluntary means to settle the dispute. If the Panel was unsuccessful in achieving a voluntary settlement, Meany suggested that the Panel "hold hearings and make a final, binding decision on the matters in dispute." He would also have permitted the parties to negotiate their own impasse procedures.³⁰ On the management side, there was considerable opposition to advisory or binding arbitration,³¹ but support for mediation and fact-finding.³²

The Review Committee was thus confronted with a number of difficult issues. Principal among these were: (1) whether there should be a central panel, either tripartite or of public members only, appointed by the President to assist in the resolution of impasses; (2) whether a provision should be incorporated in the Order permitting advisory and/or binding arbitration and, if so, whether the parties should be permitted to employ their own arbitrator with an appeal to a central panel, or be required to go to the impasse panel; (3) whether, absent voluntary resolution of a dispute and the right to strike, the impasse panel should have the power to impose a binding settlement upon the parties.

30. Statement by George Meany, Hearing Before President Johnson's Review Committee on E.O. 10988, October 23, 1967, GERR, No. 215, D-5 (October 23, 1967). John F. Griner, National President of the AFGE, also urged adoption of the Meany proposal and stressed that final and binding arbitration must be available if other procedures fail. Statement of John F. Griner to the President's Committee, October 23, 1967, p. 10 (mimeographed). See, also, AFL-CIO Maritime Trades Department, Interim Report on Collective Bargaining in the Public Sector, GERR No. 285, X-11-X-12 (Feb. 24, 1969). The Interim Report recommends a panel of three composed of one nominee each from management and labor and an impartial chairman. Likewise, James H. Rademacher, President of the National Association of Letter Carriers, urged inclusion of union representatives on the panel. GERR No. 322, A-6 (November 10, 1969). Compare the comments of IAM Grand Lodge Representative William H. Ryan, who suggested the possibility of arbitration by a "body of at least three members appointed by the President . . .", but who did not specifically advocate establishment of a tripartite panel. 24 THE MACHINIST 4 (Nov. 6, 1969).

31. See, for example, the remarks of the Treasury's Director of Personnel, Amos N. Latham, and the statement of Aubrey J. Wagner, Chairman of the Board of Directors of TVA. GERR, No. 216, A-7 (October 30, 1967).

32. Compare the statement of Anthony F. Ingrassia, director of the Post Office Department's labor relations division, urging encouragement of mediation, fact-finding, and referral to higher authority while "leaving open the question of fact-finding with public recommendations for possible consideration *after* sufficient experience has been had with existing techniques." GERR, No. 216, A-7 (October 30, 1967). See, also, the remarks of the Army's Director of Civilian Personnel, Charles F. Mullaly, at the 1968 AFGE convention, urging as a "major change" giving the FMCS an official role in resolving impasses. GERR, No. 262, A-4 (September 16, 1968).

Although the Review Committee had completed a draft report and executive order by early Spring 1968, it was not until January 1969 that the draft report was made public.³³ Its recommendations included establishment of a Federal Labor Relations Panel³⁴ (FLRP) with the power to oversee the entire federal program, to interpret the Order, to rule on appeals from decisions on certain matters, and to "assist in the resolution of negotiation impasses. . . ."³⁵ With respect to the resolution of impasses, the Committee urged that the FMCS make its services available without charge on the same basis as in the private sector, or that the parties be permitted to choose a mediator from outside the FMCS on a cost-sharing basis. Believing that "additional procedures for the resolution of impasses should be made available," the Committee advocated utilization of fact-finding with recommendations or arbitration, or both, but only pursuant to a specific agreement between the parties which would define the issues and when "other available techniques have been used." Although the report was somewhat unclear on just what were the "other available techniques," it is probable that the Committee intended that direct negotiations and referral to higher authority be two of the prerequisites for advisory or binding arbitration.

Absent successful utilization of voluntary techniques, the Committee anticipated that either party could request the services of the FLRP. The FLRP, in turn, could suggest to the parties other voluntary dispute settlement methods, or "assert jurisdiction" and, if it desired, submit the matter to an expert or experts "for recommendations to the Panel which in turn would issue a final and binding decision" Costs would be shared by the disputants.³⁶ It is noteworthy that the Wirtz Committee had, at the beginning of the section of its report on impasse procedure, utilized rhetoric similar to that found in the Goldberg Task Force report, that the "ready availability of procedures providing for the final resolution" of impasses might encourage the parties to "take their problems to a third party", rather than to work out their differences on their own. Unlike the Goldberg committee, however, the Wirtz Committee recommended adoption of a procedure which could have led to imposition of a settlement by the FLRP.

33. Report of the President's Review Committee on Employee-Management Relations in the Federal Service, GERR, No. 280, special supplement (January 20, 1969). The report was made public as an appendix to the Fifty-Sixth Annual Report of the U.S. Department of Labor. The draft executive order was not adopted by President Johnson.

34. Hereinafter referred to as FLRP.

35. Report of the President's Review Committee on Employee-Management Relations in the Federal Service, *supra* n.33.

36. *Id.* at 5.

The Schultz Commission

After taking office, President Nixon appointed a study committee of five members chaired by Secretary of Labor George P. Shultz to do a further evaluation of Executive Order 10988. The committee's report contained a considerably more detailed discussion of appropriate impasse procedures than did the Wirtz report.³⁷ The Shultz committee's principal recommendations concerning bargaining impasses were that the mediation services of the FMCS be utilized, and that there be a Federal Service Impasses Panel³⁸ to provide, in its discretion, for fact-finding with recommendations and "to take whatever action it deems necessary to bring the dispute to settlement."³⁹

Executive Order 11491,⁴⁰ issued by the President on October 29, 1969, as amended by Executive Order 11616,⁴¹ issued on August 26, 1971, created a central administrative and appellate body, the Federal Labor Relations Council,⁴² chaired by the Chairman of the Civil Service Commission, and including the Secretary of Labor, the Director of the Office of Management and Budget, "and such other officials of the executive branch as the President may designate. . . ."⁴³ The Civil Service Commission provides administrative support and services to the Council. The Order authorizes the FMCS to provide assistance in federal service negotiation disputes but gives the FMCS the right to "determine under what circumstances and in what manner it shall proffer its services."⁴⁴

The Order also establishes the FSIP, consisting "of at least three members appointed by the President," as an agency of the FLRC (for budgeting purposes) and authorizes the FLRC to furnish the FSIP with staff.⁴⁵ Under this section the Panel is given the broad authority to take any action it considers necessary to settle an impasse and to prescribe its own regulations. Either party to a dispute may ask for FSIP assistance, but only when "voluntary arrangements,"⁴⁶ including FMCS intervention, have failed. The Panel is given discretion to consider the matter and "may recommend procedures to the parties for the resolution of the impasse or

37. Report and Recommendations on Labor-Management Relations in the Federal Service 40-41 (August, 1969).

38. Hereinafter referred to as FSIP.

39. GERR, No. 32, F-4 (November 3, 1969).

40. Exec. Order No. 11491, 3 C.F.R. 262 (1973).

41. Exec. Order No. 11616, 3 C.F.R. 262 (1973).

42. Hereinafter referred to as FLRC.

43. Exec. Order No. 11491, 3 C.F.R. 262, § 40 (1973).

44. *Id.* at § 16.

45. *Id.* at § 5(a).

46. *Id.* at § 17.

may settle the impasse by appropriate action."⁴⁷ The parties may also utilize arbitration or fact-finding with recommendations, which are not conducted under FSIP auspices, to settle a dispute. They may do this, however, only when "authorized or directed by the Panel."⁴⁸ While the Order does not specifically state that the Panel has the ultimate authority to make a decision on the issues which is binding on the parties, it is empowered to settle the impasse by "appropriate action"⁴⁹ which could certainly involve arbitration.⁵⁰

Executive Order 11491, as amended, also contains a "management prerogatives clause" with language similar to that in Executive Order 10988, although more detailed.⁵¹ Under Section 11(c) of the Executive Order 11491, as amended, the FLRC has the responsibility for hearing appeals by the parties on questions related to the questions of the negotiability of a contract proposal.

*Operations of the Federal Mediation and Conciliation
Service Under Executive Order 11491*

Under the FMCS rules and regulations parties desiring to amend, modify, or terminate an existing contract must give notice on a form provided by the Service at least 30 days prior to expiration of the current agreement.⁵² The form may also be used by the parties to a dispute to request mediation assistance. In addition, the rules require that if the parties agree upon their own mediator they both must so inform the Service. The rules provide that the FCMS may intervene on its own motion, without a specific request by one or both disputants.⁵³ FMCS will offer its services when "earnest efforts by the parties to reach agreement through direct negotiation . . . have failed to resolve the dispute."⁵⁴ Initially, the rules included "referral to higher authority within the agency or the national office of the labor

47. *Id.*

48. *Id.*

49. *See, infra* n.74 with accompanying text.

50. The impasse procedures do not cover post office employees. They have their own procedures under the Postal Reorganization Act of 1970, 39 U.S.C. § 1207 (1970).

51. Exec. Order No. 11491, 3 C.F.R. 262, § 11(b) (1973) provides that the obligation to "meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

52. § 1425.3, 35 Fed. Reg. 6389 (1970). The form is F-53.

53. § 1425.2(a), 35 Fed. Reg. 6389 (1970).

54. *Id.*

organization" under the penumbra of "earnest efforts",⁵⁵ but this reference to referral to higher authority was later deleted because of a misunderstanding of its intent, and because the Service did not want to delay assistance where the parties had made serious efforts to reach agreement at the local level.⁵⁶

An FMCS staff mediator assigned to a case involving an impasse in the federal service is required to keep in contact with the parties by telephone and can convene a session where he actively participates if he believes the situation warrants his active intervention. For the period May 20, 1970, the effective date of the FMCS rules, through August 14, 1970, mediators were assigned in 65 federal impasse cases. In 30 of these the mediator held one or more joint conferences with the parties.⁵⁷ For the fiscal year 1971, FMCS mediators intervened in 101 cases.⁵⁸ This number of cases should be compared with FMCS intervention in the period 1965 to early 1969 when the FMCS intervened in only 40 cases.

Panel Rules

The Schultz committee recommended the establishment of an FSIP of three members and emphasized that the Panel should be "an impartial body, each of whose members will be concerned with the public interest rather than with the special interests of either party to an impasse."⁵⁹ In July 1970 the White House announced the appointment of seven members to the FSIP, none of whom was affiliated with either management or labor. The present chairman of the Panel is Jacob Seidenberg, an arbitrator and former executive director of the President's Committee on Government Contracts. The other six members, all with backgrounds as neutrals in labor relations, have extensive arbitration and/or mediation experience. Two of the original six members, Lloyd Bailer and Jean McKelvey, were on the advisory panel which consulted with the Wirtz Committee.⁶⁰ The FSIP

55. *Id.*

56. 35 Fed. Reg. 8426 (1970). The FMCS will also provide the parties with a panel of arbitrators for resolution of grievances or disputes concerning interpretations of the agreement, 35 Fed. Reg. 6389 (1970).

57. Telephone interview with Robert J. Callaway, National Office Representative FMCS (Ithaca, New York, August 20, 1970). Kenneth Moffett, assistant director of the FMCS, reported that impasses occur most frequently over grievance procedures, management rights, and such wage-related issues as wage surveys. GERR No. 367, A-8 (September 21, 1970).

58. E. Potter, *Fact Finding in the Federal Sector: The Development, Experience, and Evaluation of the Federal Service Impasses Panel*, August 1972 (unpublished thesis in the N.Y.S. School of Industrial and Labor Relations Library) 39.

59. See Schultz Report, *supra* note 37, at 46.

60. The other four original FSIP members were Richard L. Epstein, John J. McGovern, Arthur Stark, and James C. Vadakin.

has a staff of fact-finders with public sector experience.⁶¹ At the present time, there are no plans to utilize a panel of outside, per diem fact-finders, although Chairman Seidenberg has indicated he might designate outsiders to serve if the volume of cases warranted it.⁶² Most fact-finding hearings have been conducted by staff members, although as of January 1, 1972, in two cases the hearing was conducted by a Panel Member. The Panel also holds regular meetings.⁶³

Under the rules of the Panel,⁶⁴ either party may request FSIP consideration of the case by filing a form provided by the Executive Secretary and serving it on the other party or parties, or the Panel may act upon the request of the FMCS or the Panel's Executive Secretary. If the parties want to have their own fact-finder who will make recommendations, or an arbitrator, they must file a joint request with the Panel.

The Panel's fact-finding procedures follow practically to the letter the Shultz committee report which detailed the duties and time limits of the fact-finder and Panel, restricted the fact-finder to a determination and definition of the issues, and relegated to the Panel the authority to make recommendations.⁶⁵ Thus, the rules provide that, upon a request for Panel intervention, the Panel will make an informal inquiry of the parties and FMCS and then either (1) dismiss the request, (2) direct that negotiations be resumed, with or without mediation assistance, (3) authorize "other voluntary arrangements" for settlement, or (4) assume jurisdiction.⁶⁶ In informal consultations by telephone with FMCS officials, the Panel attempts to determine (1) the number of issues at impasse and the number and length of mediation sessions (2) whether the FMCS officials involved believe further mediation would be useful, (3) whether, if the Panel decided, FMCS would actively intervene. Finally, the FSIP attempts to obtain from FMCS (4) a recommendation on the advisability of fact-finding.⁶⁷

When the Panel's rules were first announced in 1970, there was a provision⁶⁸ that where "any of the several subjects of an impasse are based on the negotiability of an issue" it will not be considered by the FSIP but will be handled in accordance with the provisions of 11(c) of the Order

61. Telephone interview with David T. Roadley, Executive Director, FSIP (Ithaca, New York, August 24, 1970).

62. Seidenberg, *New Uses for Arbitration in the Federal Sector*, in *Negotiation-Arbitration '72* 215, 221 (Luke Power ed. 1972).

63. *Id.*

64. 37 Fed. Reg. 20671 (1972).

65. Report, *supra* note 37 at 47-48.

66. § 2471.6; 37 Fed. Reg. 20671-72 (1972).

67. Potter, *supra* note 58 at 57.

68. § 2471.6(b), 37 Fed. Reg. 20672 (1972).

which, along with Section 4(c)(2), provided for appeals to the FLRC on issues of negotiability.⁶⁹ The original FSIP rules also provided, however, that "the balance of the dispute [which does not involve an issue of negotiability] may be considered by the Panel." Under the newly revised rules⁷⁰ there is no longer any mention of Panel consideration of "the balance of the dispute" where there is an issue of negotiability. Instead, there is an expedited procedure under which the Panel may refer questions of negotiability directly to the FLRC and receive a direct response from FLRC which is incorporated in the Panel's fact-finding report to the parties.

Upon a determination by the Panel that fact-finding is warranted, the Panel will appoint a fact-finder who may hold a prehearing conference to explore possibilities for obtaining stipulations of fact, to clarify the parties' positions on what issues are being submitted to fact-finding, and to discuss hearing procedures and "any other relevant matters."⁷¹ The fact-finder is authorized to hold a formal hearing⁷² and to write a report which must include, *inter alia*, findings of fact on the history and context of the current negotiations and the unresolved issues as well as the parties' justification for each proposal; it is not to include recommendations for resolution of the issues. The report is to be submitted to the Panel "within a reasonable time, normally not to exceed 20 calendar days, after receipt of the transcript, or after receipt of briefs, if any."⁷³

The rules of the Panel require that the parties be advised when the report has been submitted to the Panel, but under the rules the report is not to be transmitted to the parties. The Panel is then to "evaluate the impasse" and to "submit its recommendations for settlement" or to take "any other action which it deems appropriate." The fact-finder's report is not appended on the Panel recommendations when they are sent to the parties. After receipt of the recommendations, the parties have 20 calendar days to either (1) accept the recommendations, (2) reach settlement of all unresolved issues, or (3) submit a written statement to the Panel as to why the recommendations are not acceptable and why no settlement has been reached. If issues remain unresolved after expiration of the above twenty-day period, the rules provide that the Panel "will take whatever action it deems necessary to bring the dispute to settlement."⁷⁴

69. Exec. Order No. 11491, 34 Fed. Reg. 17605 (1969).

70. § 2471.7, 37 Fed. Reg. 20672 (1972).

71. § 2471.10, 37 Fed. Reg. 20672 (1972).

72. A transcript of the hearing may be purchased by the parties.

73. § 2471.13, 37 Fed. Reg. 20672 (1972).

74. As indicated *supra* page —, if one assumes that the language of the Executive Order gives the panel the authority to issue a binding award, the "action it deems necessary" might involve arbitration by the Panel.

The Panel in Operation

During the first seventeen months the Panel was in operation it received a total of 41 cases.⁷⁵ Of these, the Panel declined jurisdiction in eight, and returned 15 more cases for more mediation, or negotiations, or "other voluntary arrangements." Four cases were withdrawn after the initial staff inquiry. One case was settled prior to fact-finding. In the four cases where the Panel's recommendations were transmitted to the parties, the parties settled on the basis of the recommendations.

The Panel has had considerable problems with the negotiability of certain issues. Of the 41 cases it received, six were referred to FLRC because the impasse involved a question as to the negotiability of an issue or issues under Section 11(c) of the Executive Order. Furthermore, the number of cases referred to the FLRC does not fully reflect the difficulties the Panel has had with the negotiability problem.⁷⁶ Potter notes that at least 20 of the Panel's cases have involved problems connected with the negotiability of certain issues.⁷⁷ These statistics suggest that the Panel has attempted to avoid referring negotiability questions to the FLRC.⁷⁸

Has the Panel been willing to use mediation at various stages of the fact-finding process? Using a questionnaire which was returned by 47 individuals representing the parties in FSIP cases, Potter determined that in nine cases where the parties indicated that the Panel staff member had attempted to mediate at the initial inquiry stage, more than half the respondents believed that the staff member's efforts had served to narrow the gap between the parties and had served as an "educational process."⁷⁹ Questionnaires returned by representatives of the parties in five cases where the Panel had authorized fact-finding showed that more than three-quarters of the respondents believed that mediation by the fact-finder, either at the pre-hearing conference or at the fact-finding hearing, had served as an "educational process," but that only one-third believed that the fact-finder's mediation efforts had substantially reduced the gap between the parties.⁸⁰ These results compared favorably with the parties' opinion of the effectiveness of mediation by FMCS prior to Panel involvement.⁸¹ As of August 1, 1972, there had been no mediation efforts after the fact-finding recommendations had been handed down, either by the Panel staff or by FMCS

75. Potter, *supra* note 58 at 53.

76. *Id.* at 64.

77. *Id.*

78. For a good discussion of ways which the Panel has handled negotiability problems, see Potter, *Id.* at 67-73.

79. *Id.* at 126.

80. *Id.* at 127.

81. *Id.* at 109.

mediators, although the FSIP had notified FMCS that the Panel had transmitted its fact-finding recommendations to the parties.

Problems

An examination of the rules and operations of the FMCS and FSIP raises a number of difficult problems concerning the effectiveness of the Federal Service impasse procedures. In addition, the FSIP rules do not specifically account for certain potential problems which might arise in the operation of the impasse procedures. These actual and potential problems are discussed below.

1. The Composition of the FSIP

It has been suggested that the Panel be tripartite⁸² and that it be composed of individuals "prestigious enough to command the respect of the parties and the public—people of the stature of David Cole, Ted Kheel, Professor John Dunlop of Harvard, Arthur Goldberg, Willard Wirtz, etc."⁸³

At present, the Panel is composed entirely of public members. The principal basis for the contention that the Panel should also include representatives of labor and management is that, since the Panel can ultimately require acceptance of its recommendations if there is not voluntary settlement at an earlier stage, the parties are more likely to have confidence in the Panel's award if the Panel includes representatives of the parties.⁸⁴

The difficulty with the argument in favor of a tripartite Panel is that it does not account for the possibility of split decisions which may give the party dissatisfied with the Panel majority's resolution of the issues a substantial basis for discontent—the dissenting view of the Panel minority. Furthermore, some of the smaller labor organizations representing government employees, including those unaffiliated with the AFL-CIO, might find themselves unrepresented on a tripartite Panel, which could considerably detract from their confidence in the impasse resolution process. There is also the possibility that the appointment to the Panel of labor and management officials who had outside time commitments to their constituencies would involve the Panel in considerable delays in the decision-making process.⁸⁵ Thus, adoption of a tripartite arrangement could very well result in

82. See Berger, *The Old Order Giveth Way to the New: A Comparison of Executive Order 10988 with Executive Order 11491*, 21 LAB. L.J. 79, 81 (1970). See, also, the statements of various union officials at note 25, *supra*.

83. See Madden, *To Strike or Not to Strike: Does the Government Already Have an Alternative*, 21 LAB. L.J. 310, 317 (1970).

84. See Wellington and Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 833 (1970).

85. This was a problem under the tripartite National Labor Relations Board, estab-

a panel which is no more effective than the present Panel, and possibly less effective. While the four cases where the Panel issued recommendations and had them accepted is not a large enough number upon which to generalize concerning Panel success, there is little or no evidence to date to show that the absence of a tripartite arrangement has operated as a substantial detriment.⁸⁶

Is it necessary to have Panel members with "big names" in the labor relations field? While all the Panel members have considerable experience in labor relations,⁸⁷ none is the subject of daily commentary in the news media. It is at least arguable, however, that expertise in public sector labor relations and a reputation untainted by partiality in federal sector employee relations should be the principal criteria for Panel selection. One might contend that whether the FSIP members "command the respect" of the parties depends, therefore, much more on how well they do their jobs than on whether their names have appeared regularly in the daily press.

One final criticism concerning appointments to the Panel is worth noting. At present, there is no term of office for Panel members. It has been pointed out that the Panel members are therefore subject to discharge by the President at any time.⁸⁸ While it is unlikely that the President would fire a Panel member who came out on the "wrong side" of a case, it may be argued that the absence of a definite term of office for Panel members might give the appearance of compromising their impartiality. Certainly, then, there is merit to the contention that Panel members should be appointed for a definite number of years.

2. *Interaction of FMCS and FSIP at the Initial Inquiry Stage*

One point in the impasse procedures where there is the potential for difficulty is at the initial inquiry stage when the Panel is attempting to determine whether it should take jurisdiction. To be effective, FMCS mediators must be given an opportunity to intervene actively and to push hard for set-

lished in 1933. See J.A. Gross, *The Making of the National Labor Relations Board, 1933-1937: A Study in Economics, Politics, and the Law*, Ch. II an unpublished manuscript in the files of Prof. James A. Gross, New York State School of Industrial and Labor Relations, Cornell University, Ithaca, New York.

86. This is not to suggest that where parties themselves have provided for tripartite fact-finding, as they have in a number of contracts (see note 12, *supra*), the Panel should refuse to authorize such fact-finding under Section 17. Clearly, a tripartite body is not inappropriate; it may simply prove more cumbersome in operation.

87. For a brief review of the background of the original Panel members, see Seidenberg, *supra* note 62, at 219.

88. See the remarks of James H. Rademacher. GERR No. 324, F-1 (November 24, 1969).

tlement—which could take a considerable period of time—or to temporize and give the parties opportunity for further negotiation on their own. Thus, while the parties, and particularly inexperienced parties, may believe that further mediation would be fruitless and that fact-finding is the only answer, too ready access to the FSIP could operate to impede the effectiveness of the mediator and to turn mediation into a *pro forma* exercise in intervention by a neutral. If mediation is to be a useful tool in the conciliation process, the FSIP has to be willing to give considerable weight to the judgment of the FMCS mediator as to the prospects for a settlement at the mediation stage and as to whether FSIP assumption of jurisdiction at that point in time might limit the prospects for future voluntary settlement. In other words, there has to be a close working relationship between the FMCS and FSIP on the prospects for settlement at the mediation stage when one or both parties have asked for FSIP intervention.

It might be argued that too close a relationship between the FSIP, which has the power ultimately to impose a settlement, and the FMCS mediators could jeopardize the confidentiality which is the touchstone of the mediation process by giving the parties the impression that the mediator might disclose to the FSIP proposals made during mediation. The proposals could very well be different from the parties' positions before the FSIP fact-finder. Certainly, efforts should be made to preserve the integrity of the mediation process, both in appearance and in actual operation. This does not preclude, however, the formulation of procedures which do not involve the communication of confidential information.

The communications mechanism worked out by FMCS and FSIP appears to be responsive to the above concerns. Thus, the informal telephone inquiry by FSIP staffers of FMCS does not involve an attempt to determine the parties' concessions on specific issues, but does involve an effort to obtain the opinion of FMCS officials as to the utility of further mediation. Furthermore, the relatively large number of cases where the Panel has either declined jurisdiction or returned the case for more mediation suggests that the Panel is indeed taking a tough stance in connection with requests that it assume jurisdiction.⁸⁹

3. *The Role of the FMCS and FMCS Mediators*

There are potential problems in connection with intervention of FMCS after fact-finding or after the exhaustion of the parties own impasse procedures, which are not specifically dealt with under FMCS or FSIP rules. In

89. The Chairman of the Panel has characterized this as a "hard boiled" attitude on the jurisdiction question. Seidenberg, *supra* note 62, at 219.

addition, there is the question of whether it would ever be advisable for the FMCS mediator to make formal recommendations for resolution of the issues prior to assumption by the FSIP of jurisdiction.

It should be evident that there is the potential for mediation not only because the FSIP has taken jurisdiction, but also after the FSIP has issued fact-finding recommendations. While the mediator has only his own ingenuity and persuasive powers to aid him when he first enters the case, anyone who attempts to mediate after fact-finding where one or both parties have not accepted the fact-finding recommendations has the additional leverage of a fact-finding report to fall back upon. This suggests the advantages in some cases of mediation after fact-finding. It also poses the problem of who should do the mediation—the FMCS staff mediator or an FSIP staff member (perhaps the FSIP fact-finder) or Panel member.

It should be evident that there is the potential for mediation not only before the FSIP has taken jurisdiction, but also after the FSIP has issued fact-finding recommendations.

The advantage of using the fact-finder is that he has the most immediate contact with the case and may be familiar with recent developments and changes of position of which the mediator was not aware. In addition, he can rely upon his association with the FSIP, which has authority to impose a settlement, to increase his prestige. On the other hand, the fact-finder may find himself embroiled in a defense of the fact-finding recommendations before the party or parties who have refused to accept them. Later the fact-finder may have to urge a compromise which would involve modification of the fact-finding recommendations but which would be the only way of breaking the impasse. The fact-finder's situation is made even more difficult if one side has accepted the fact-finding recommendations and the other has not. Then, he may have to persuade the side which accepted of the necessity of making further concessions, if this is the only way to achieve settlement. Of course, an FMCS mediator might have this problem too, but he also might have an easier time selling a settlement which deviated from the fact-finding recommendations. For an FSIP staffer or member would have the burden of explaining why the fact-finding recommendations emanating from his own panel should not be followed, whereas the mediator, being employed by an entirely different agency, would not be so burdened. Perhaps the most significant disadvantage of employing an FSIP staff member to do mediation after fact-finding involves the parties' knowledge that it is the FSIP which ultimately can impose settlement.⁹⁰

90. This assumes, of course, that the language of the Executive Order does give the Panel that authority.

There could very well be a reluctance to impart to the FSIP staff member the extent to which a party was willing to make concessions—particularly if a voluntary settlement based upon those concessions was not certain—and considerable basis for “holding something back” if a party knew that it was the FSIP which might ultimately have to impose a settlement. For these reasons, one could contend that there should be sufficient flexibility in the procedures employed by both the FMCS and FSIP to permit an FMCS mediator to come back into the case after the FSIP has asserted jurisdiction and even after fact-finding.

When the parties have adopted their own impasse procedure which provides for mediation and the mediator they have chosen is unsuccessful, should the FMCS assign one of its own mediators to the case? Here, again, one could argue that FMCS and FSIP procedures should be sufficiently flexible to permit the FMCS to assign a staff mediator in appropriate situations where the parties have exhausted their own impasse procedure. It may be that changed circumstances would warrant FMCS intervention even where there previously had been another mediator in the case.

Should the FMCS mediator be empowered to make recommendations to the parties prior to fact-finding for resolution of the impasse? At times, the parties may be close to settlement but may be unwilling, perhaps for political reasons, to agree on a contract on their own. Here, the mediator may serve as the “royal whipping boy” by recommending a settlement which he knows the parties are likely to accept as the “federal mediator’s recommendations.” Each side may then say the settlement is not entirely satisfactory, but it is what the mediator recommended so “we will go along.” Surely, then, the mediator should have the flexibility to make recommendations in appropriate cases. But, he should also insure that if his recommendations are not accepted and the parties proceed to fact-finding, the recommendations are not introduced at the fact-finding hearing.⁹¹ This may be accomplished if the mediator makes his recommendations in writing and appends to his recommendations the stipulation that they may not be made public unless and until they are accepted in their entirety by both parties and that they may not be introduced in any FSIP proceeding.

4. *The FSIP Fact-Finding Process*

Troublesome due process questions may be raised with respect to the Panel’s fact-finding process as outlined in its rules. It is the fact-finder who hears

91. One writer has emphasized that if settlement at the mediation stage is to be encouraged, “fact-finders should be precluded from receiving evidence of what transpired at the mediation level.” Zack, *Improving Mediation and Fact-Finding in the Public Sector*, 21 LAB. L.J. 259, 272 (1970).

the case but his findings are not transmitted to the parties. Rather, the Panel is given the fact-finding report, makes its recommendations on the basis of the report, and only then transmits those recommendations to the parties. The parties are not given an opportunity, therefore, to review and respond to the findings of fact before issuance of the Panel's recommendations. Apparently, they never see the fact-finder's report—at least not in the form in which it is submitted to the Panel. Thus, a party unwilling to accept the Panel's recommendations on the ground that there were omissions or errors of fact in the Panel's decision is faced with the prospect of asking for reconsideration and a possible reopening of the hearing *after* the Panel has handed down its recommendations. This is a far more burdensome task—and less fair a procedure—than if the parties were given an opportunity to read the fact-finding report and respond to it *before* Panel decision.

Of course, under the regulations there is a provision for making a transcript of the fact-finding hearing which would then provide the Panel with a full record of evidence and argument. Furthermore, the FSIP rules do permit the filing of briefs with the fact-finder, which the Panel could then read. The problem with a transcript, however, is that it is costly and time consuming to prepare. Furthermore, the parties must have an opportunity to read the transcript and then to refer to it in their briefs. This could add vital weeks to the total period of time required for fact-finding. Then, too, the Panel, or its staff, might have to refer to the transcript during their deliberations, which could add days to the decisional process. Likewise, briefs filed after the fact-finding hearing—and the parties might very well want to file briefs if they were not given a crack at the fact-finding report before Panel consideration—would have to be limited to a discussion of evidence and argument before the fact-finder and could not consider the fact-finder's own findings which might involve a determination on a crucial issue.

Aside from the due process issue, there are good reasons why the fact-finder should be empowered to make recommendations and why his report and recommendations should be considered by the parties before the Panel members themselves come into the picture. If the Panel wishes to encourage *voluntary* acceptance of the fact-finding recommendations, or further negotiations based upon those recommendations and a *voluntary* settlement of the impasse, then there should be some uncertainty injected into the Panel procedures.⁹² That is, the parties should know that there is always the pos-

92. It is certainly possible to argue that where the Panel is given the power ultimately to impose a settlement—and a good argument can be made that it does have that power—all the intermediate steps of the impasse resolution procedure become a charade. Nevertheless, the analysis herein proceeds from the basic premise of the

sibility that if the Panel has the authority to impose a settlement, that settlement might be different from the one recommended by the fact-finder. For example, a party reluctant to accept the fact-finder's recommendation voluntarily should be made aware that the Panel always has the option of imposing a settlement even *less* favorable to him than the one recommended by the fact-finder. But, if it is the Panel itself which initially makes the recommendations based upon all the evidence before it, the Panel would be hard pressed to develop a logical basis for deviating from those recommendations if it later had to impose a settlement. Thus, as a practical matter under the rules the parties would know that the Panel's fact-finding recommendations were probably the final statement of Panel position on the issues.⁹³ This hardly leaves the parties much room for truly voluntary acceptance of the recommendations or further negotiation based upon those recommendations and a voluntary settlement. On the other hand, if the fact-finder was first permitted to transmit a report and recommendations to the parties, without making the recommendations public and without prior Panel consideration, the parties might be encouraged to reach agreement on a contract and the time of the Panel members would not be consumed in consideration of the matter. In sum, giving the fact-finder the power to make recommendations and to transmit his report and recommendations to the parties prior to Panel consideration satisfies due process requirements, encourages voluntary settlement, and could save the Panel members considerable time.

While one may consider it desirable to give the fact-finder power to make recommendations and to transmit those recommendations to the parties, the objective of the impasse procedures is to encourage voluntary settlement—there is still the problem of how to overcome the clear interdiction in the “legislative history”—the Shultz committee report—against the fact-finder making recommendations. Here, it may be argued that where the stated objective of the impasse procedures is to encourage voluntary settlement—and this comes over as clearly in the Shultz committee report as it did in the Wirtz and Goldberg committees reports⁹⁴—this goal must be given overriding effect where it is in clear conflict with a specific recommendation in

Goldberg, Wirtz, and Shultz reports that it is desirable and possible to encourage voluntary, negotiated settlements in the Federal Service.

93. The finality problem is underscored by the fact that there is probably no appeal to the courts from an FSIP binding award. Thus, executive orders, such as 11491 and 11616, issued without specific statutory authorization or not intended to implement an Act of Congress apparently are not reviewable in court. See, *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). Cf. *National Association of Government Employees v. White*, 418 F.2d 1126 (D.C. Cir. 1969).

94. Report, *supra* note 37, at 44.

the Shultz Committee report.⁹⁵ Since, as indicated above, the failure to give the fact-finder the power to make recommendations could very well discourage voluntary settlement, it may be contended that the fact-finder should have this power, the Shultz Committee recommendation notwithstanding. Alternatively, it may be argued that while the Panel has been given the recommendatory function, it may delegate that function in appropriate circumstances, and particularly where the impasse resolution process would be facilitated. Finally, it may be noted that, if under Section 17 of the Order the Panel may authorize the parties to employ their own fact-finder who may have the power to make recommendations, it appears somewhat incongruous to deny the Panel fact-finders that same power.

Should Panel fact-finders be empowered to mediate in appropriate situations prior to issuance of the fact-finding report? Particularly where the fact-finder is an FSIP staff member, he may have considerable leverage to mediate a settlement prior to the making of formal recommendations. This is so because the parties know that it is the FSIP to which the fact-finder is responsible, and that the FSIP can ultimately impose a settlement. If the parties do not settle, they know that it is the fact-finder who will file a report with the FSIP. (This leverage is considerably diminished, of course, where the fact-finder is not empowered to make recommendations.) An FMCS mediator is thus not likely to stand in quite so influential a position as the FSIP fact-finder.⁹⁶ On the other hand, the fact-finder's strength in mediation is also a potential source of difficulty. It can easily happen that the fact-finder would go too deeply into a case as a mediator and extract from the parties compromises they might be willing to make at the mediation stage to get a settlement but which they would be unwilling to propose to a fact-finder. Thus, if the fact-finder is unsuccessful as a mediator, he may, because of his knowledge of proposals made in mediation, be unable objectively to consider more conservative positions of the parties in fact-finding. Furthermore, if the fact-finder is an FSIP staff member and he prejudices himself in this way, serious questions might be raised with respect to the impartiality of FSIP members themselves if they should have to consider the issues in the case.

95. Indeed, Executive Order 11491 does not follow to the letter the Shultz committee recommendations on resolution of impasses. Thus, the committee recommended that the FSIP have three members (Report, *supra* n. 37, at 46) but Section 5 of the Executive Order permits the appointment of "at least" three members and the President actually appointed seven individuals to the Panel.

96. For a strong argument in favor of giving the fact-finder the authority to mediate, see Zack, *supra* note 94, at 269-70. Zack notes that it is important for the fact-finder to be able to encourage the parties in certain cases to reduce a long list of unnegotiated issues, many of minor importance, to a manageable number for fact-finding. See, also, Wellington & Winter, *supra* note 84, at 830.

This is not to argue that FSIP fact-finders should never mediate.⁹⁷ The Potter study statistics referred to earlier suggest that mediation by the fact-finder can be useful. Rather, one may contend that FSIP fact-finders should be cautious about attempting to mediate.⁹⁸

5. *Paying for the Fact-Finding*

While the Wirtz and Shultz committees had recommended that the parties share the cost of the fact-finding, under the FSIP rules the FSIP will assume the cost of fact-finding. Should the parties pay for the fact-finding when it is conducted under FSIP auspices? There is much to be said for the argument that the parties will be encouraged to settle at the mediation stage if they know they will have to pay for fact-finding.⁹⁹ One might argue, however, that, under an Order which does not grant the right to strike, impasse procedures should be readily available, particularly to small employee organizations with limited funds.¹⁰⁰ Furthermore, it may be contended that where the agency employing the fact-finder has the authority ultimately to issue a binding decision on a settlement which is supposed to be in the public interest as well as in that of the parties, there should not be even the appearance of compromising the impartiality of the fact-finder or of making him simply the tool of the parties, which might be the case if

97. The problem is more immediate, of course, where it is the FSIP member who is doing the fact-finding.

98. For differing views on, and experiences with, the fact-finder as mediator, see Howlett, *Arbitration in the Public Sector*, in Southwestern Legal Foundation 15th Ann. Inst. on Labor Law, LABOR LAW DEVELOPMENTS, 231, 249, 1969, and Schmidt, *Observations on the Process of Fact-Finding in Michigan Public Education Teacher-School Board Contract Disputes*, in BNA, Public Employee Organization and Bargaining 81, 85 (1968). Cf. McKelvey, *Fact Finding in Public Employment Disputes: Promise or Illusion?*, 22 IND. & LAB. REL. REV. 528, 543 (1969), and Anderson, *The Use of Fact-Finding in Dispute Settlement*, Proceedings of the Twenty-Second Annual Meeting of the National Academy of Arbitrators 107, 122 (1970).

The New York experience is discussed in Newman, *Conciliation Procedures*, 3 PERB News 3 (May 1970) and in 1 PERB Bulletin for Mediators/Fact Finders No. 5 (June 1970). For an empirical study of the utility of mediation during fact-finding, see Yaffe and Goldblatt, *Fact-Finding in Public Employment in New York State: More Promise than Illusion* (1971) 33-35, 41.

99. See, Wellington and Winter, *supra* note 84, at 830. The authors suggest that "the problem is to make the process [fact-finding] expensive enough to encourage settlement without its use, but not so expensive that it will not be invoked when it might prove helpful." They then note that a "favored" solution is for the parties to share the cost equally but have the agency set the fee. Professors Wellington and Winter do not recognize that the costs may fall unequally on poor public employers or labor organizations, while not effectively encouraging settlement where large or wealthy public employers or labor organizations are involved. It is possible, of course, to have a sliding scale of fees depending on size, but this may involve unequal payments where the public employer is large and the labor organization small.

100. See the remarks of Professor Maurice Neufeld and the response of Harold Newman, in 1 PERB Bulletin for Mediators/Fact-Finders No. 5 (June 1970).

the parties paid him. Finally, and perhaps most importantly, unlike the situation in some jurisdictions at the local government level, the cost of fact-finding is not likely to have any impact upon the budget of federal agencies, nor can the labor organization at the federal level make the same use of the fact-finding recommendations to bring public pressure for public employer acceptance of the recommendations that it sometimes does at the local level.¹⁰¹ For these reasons, one could argue that it is wiser, at least initially, for the Panel to assume the cost of fact-finding undertaken by Panel fact-finders. By the same token, it may be contended that the cost of the transcript of the fact-finding hearing which the parties are now required to purchase should be paid by the FSIP.

6. *Fact-finding Recommendations Where the Parties Chose the Fact-finder*

There undoubtedly will be questions raised with respect to the weight the Panel should give to the recommendations of fact-finders chosen by the parties pursuant to private impasse procedures in situations where one or both parties have rejected the recommendations and the Panel asserts jurisdiction. One could contend that if the FSIP considers it desirable to encourage the parties to fashion their own impasse procedures and to reach settlement under those procedures, it should be willing to give considerable weight to the recommendations of the fact-finders chosen by the parties, while leaving some uncertainty in the Panel's decisional process to encourage the voluntary acceptance of the fact-finder's report. Among the criteria for review, the Panel might consider whether the fact-finding proceedings appear fair and regular, whether the fact-finder made recommendations on all unresolved issues, whether the recommendation should be modified because of new developments.¹⁰²

7. *Negotiability Issues and the IMPASSE Resolution Process*

A final problem concerns impasses over the negotiability of certain items. As noted earlier, under Executive Order 10988 considerable concern was ex-

101. Of course, there is the possibility that the labor organization could use the fact-finding recommendations to bring Congressional pressure for settlement, but whether a congressman would wish to intercede prior to a final and binding decision by the FSIP is open to question.

102. Compare, *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955). There remains the problem of what weight to give the recommendations of a bipartite fact-finding panel, since such a body does not include an impartial third party. (See note 12, *supra*.) The question is not likely to arise, however, since if the representatives of the two parties could agree on recommendations, the report would very likely be accepted, whereas if they could not agree there would ordinarily be no majority opinion to consider under the above criteria.

pressed about the limited scope of bargaining.¹⁰³ It could be expected, therefore, that with a management prerogatives clause written into Section 11(b) of the Executive Order 11491, just as under Executive Order 10988, disputes would arise over the negotiability of certain labor organization proposals, which, in turn, would propel the parties to impasse. The relatively large number of FSIP cases which involved a negotiability question bears out this expectation.

It should be immediately apparent that where the issues which may be considered by the Panel are in whole or in part contingent upon the disposition of the proposal over which there is an issue as to negotiability, the Panel might have considerable difficulty in proceeding to make recommendations without an FLRC ruling on the negotiability point. In other words, insofar as a workable settlement may depend upon satisfactory compromises on *all* subjects in dispute, as well as the dropping of some labor organization proposals in return for the granting of others, one could argue that the Panel must see the whole picture. This suggests the importance of a quick decision by the FLRC on negotiability appeals.¹⁰⁴ The evidence to date indicates, however, that FLRC proceedings are not the most expeditious. Whether the new FSIP procedures for obtaining a quick decision from FLRC on negotiability questions will help much remains to be seen. Whatever happens, one may argue that the problem confronted by the FSIP is generated by the management prerogatives language in the Executive Order and by the Executive Order's conferral on the FLRC of authority to consider appeals on negotiability, and not by the FSIP rules. Absent FSIP authority to decide negotiability questions or simply to assume that an issue is negotiable, subject to later FLRC review, the FSIP is not likely to find a wholly satisfactory solution to the problem of dealing expeditiously with cases which involve questions of negotiability.

Conclusions

Problems related to the function of the FSIP fall into two categories: (1) those which concern the interaction of the FSIP with other agencies or bodies (the FMCS and the FLRC); and (2) those which involve the operations of the FSIP itself.

An analysis of the problems in category (1) reveals the difficulties inher-

103. See the text at note 21, *supra*.

104. It is, of course, possible for a skillful mediator to promote discussions about the substance of an issue where the negotiability of that issue has been challenged. But, after impasse when the mediator is out of the picture and the negotiability problem must be referred to the FLRC for resolution, there will undoubtedly be a considerably reduced chance for settlement if the negotiability issue is not met head on.

ent in any system of impasse resolution where the mediation agency is separate from the fact-finding body. Where the agencies are separate there will be problems in coordinating the mediation and fact-finding functions. It may be difficult for the fact-finding. Or questions may arise as to which agency will be responsible for mediation during or after fact-finding. Indeed, the difficulty in reaching some accommodation between two "competing" agencies becomes considerable where one or both agencies have been in existence for some time performing services in the private sector and have adopted rules and procedures which conflict and do not facilitate handling of impasses in the public sector.

One might argue that where one agency handles both mediation and fact-finding the confidentiality of the mediation process could be compromised. Thus, it might be contended that within the single agency there would be some temptation to provide the fact-finder with some information concerning the parties' proposals during mediation. While the importance of preserving the confidentiality of the mediation process should not be overlooked, the fact that the mediators and fact-finders are paid by the same agency and are subject to the same administrative control does not preclude the imposition of restraints on the communications of mediators. At the same time, lodging mediation and fact-finding functions in one body makes the job of working out some accommodation between the use of mediators and the employment of fact-finders, in appropriate situations, a far easier task than it would have been had mediators been assigned by one agency and fact-finders by another.

This is not to suggest that where there is already in existence a mediation service handling private sector disputes there must necessarily be established a parallel agency for public sector mediation and fact-finding. It may not always be possible, for political or budgetary reasons, to create a completely new agency to handle public sector disputes. Consideration might be given in the above situation, however, to expanding the private sector role of the existing mediation agency to include public sector mediation and fact-finding. The danger—and this is the lesson to be learned from the federal service example—is in the situation where mediation and fact-finding functions are assigned to different bodies.

With respect to the problems of establishing an effective impasse resolution procedure, indicated in (2) above, the watchword should be "uncertainty of result." Whether or not the last step of the procedure involves imposition of a binding settlement by the agency responsible for impasse resolution, there should in any case be sufficient options open to that agency at earlier steps in the procedure to create some uncertainty as to what will come next and thereby to encourage the parties to reach a voluntary set-

tlement on the issues in dispute. The danger is—and again this is illustrated by the relegation of the recommendatory function to the FSIP itself—that the last step in the impasse procedures will be thought of as inevitable. The parties, rather than negotiating in earnest, will then merely play out the procedures until they reach that last step. Consequently, the success or failure of the Federal Service Impasses Panel or of any impasse resolving body, for that matter, may well turn both on its ability to coordinate its efforts with the other agencies whose operations bear upon impasse resolution and on its willingness to design its procedures so that there are sufficient options open to it at every step to create some uncertainty as to what will come next.